1988

National Parks and Conservation Association v. Board of State Lands, Patrick D. Spurgin, Division of State Lands and Forestry, State of Utah : Brief of Petitioner

Utah Supreme Court

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BRIEF

SUPREME COURT OF THE STATE OF UTAH

NATIONAL PARKS AND CONSERVATION ASSOCIATION,

Petitioner,

vs.

BOARD OF STATE LANDS and PATRICK D. SPURGIN, AS DIRECTOR, DIVISION OF STATE LANDS AND FORESTRY, STATE OF UTAH,

Respondents.

Case No. 880022

BRIEF OF PETITIONER

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JURISDICTION OF THIS COURT AND NATURE OF PROCEEDINGS BELOW

Jurisdiction in this Court rests on Utah Code Ann. § 78-2-2(3)(e) which vests jurisdiction in this Court to review all final orders and decrees in cases originating in the Board of State Lands. (The "Board.")

The proceedings below, before the Board and the Director of the Division of State Lands and Forestry (the "Director" and "Division"), consisted of the filing, consideration and approval of an application by Garfield County for a land exchange. In that exchange, the County sought to acquire a section of State land which had originally been granted to the State of Utah under § 6 of the Utah Enabling Act, 28 Stat. 107, 109. The section in question is located within Capitol Reef National Park. Agency action also included: denial of a petition to intervene in the exchange proceedings filed by the National Parks and Conservation Association ("NPCA," the petitioner); denial of NPCA requests to defer decision pending opportunity for investigation; denial of certain NPCA requests for declaratory rulings filed under Utah Code Ann. § 63-46a-15, relating to issues raised by the exchange proceedings; and issuance of one requested declaratory ruling stating certain standards governing the Board or Division's decision on the proposed land exchange.

On September 11, 1987, the Board approved the land exchange "in concept," subject to the County's fulfillment of certain further conditions. On December 21, 1987, the Director of the Division of State Lands and Forestry formally approved the exchange; and pursuant to that approval, the Governor executed a patent conveying the land to the County on December 24, 1987.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Director of the Division unlawfully denied NPCA's request to intervene in proceedings pending before the Board and Division on an application by Garfield County for approval of a land exchange by which it proposed to acquire a State school section within Capitol Reef National Park in exchange for certain County lands (the "Capitol Reef land exchange").

2. Whether the Director of the Division unlawfully denied NPCA's procedural requests to defer decision on the application pending public notice, access to further information, and opportunity to review the Director's reply to NPCA's requests for declaratory rulings.

3. Whether, in response to NPCA's requests for declaratory rulings pursuant to Utah Code Ann. § 65-46a-15, the Director of the Division erred in holding that legal standards governing decision on the Capitol Reef land exchange required

that "when there is a choice between two actions, both of which provide some measure of economic benefit to beneficiaries of the school trust," decision must prefer the option that will generate the "greater economic advantage" and may not give weight to other statutorily-mandated management policies that require or permit protection of significant scenic, aesthetic and recreational values such as the "multiple use/sustained yield" policy of Utah Code Ann. § 65-1-14 and the policies against impairment or derogation of national parks prescribed by 16 U.S.C.A. § 1 and 1a-1.

4. Whether the Board and Director, in approving the Capitol Reef land exchange, erred in failing to make factual and legal determinations required by applicable legal standards, including those stated in the Director's reply to NPCA's request for declaratory rulings, particularly:

(a) The failure to determine whether application of "trust" management concepts were considered by the Board or Director to require approval of the Capitol Reef land exchange, and failure to make factual determinations necessary to apply those concepts.

(b) The failure to determine whether, and the extent to which, the Capitol Reef section may or must be managed to preserve the scenic, aesthetic and recreational values and resources on or proximate to that section in

accordance with the "multiple use/sustained yield" principles prescribed by Utah Code Ann. § 65-1-14 and/or the nonimpairment requirement of the National Park Service Organic Act, as amended, 16 U.S.C. §§ 1 and 1a-1 (1974 and West Supp. 1987).

(c) The failure to determine whether feasible management options were available which, without material economic disadvantage, through land exchange or other administrative disposition, would have permitted or assured compliance with protective statutory standards or policies applicable to the Capitol Reef section through conveyance to the National Park Service in return for acquisition of other lands to be managed for economic return.

(d) The failure to determine the extent to which election of management options for the Capitol Reef section designed to preserve its scenic, aesthetic and recreational values would benefit future members of the open class of trust beneficiaries by protecting and preserving long-term trust asset values.

(e) The failure to determine whether management designed to preserve the scenic, aesthetic and recreational values on or related to the Capitol Reef section in compliance with other protective statutory policies would generate sufficient long-term or short-term economic benefit to satisfy trust obligations.

(f) The failure to give consideration and effect to the Board's previously-adopted policies recited in Division of State Lands and Forestry, "Surface Policies" (1966 through December 1986), including its policy titled "Management of Sensitive Areas" (§ 1.600) and its policy titled "Environmental Assessments" (§1.400-1.411).

(g) The failure to determine or resolve other material substantive and procedural issues concerning the proposed exchange that had been identified by members of the Board, Division staff, officials of the U.S. National Park Service and others in the course of the exchange proceedings.

5. Whether the decision to approve the Capitol Reef land exchange was unlawfully made or participated in by the Board, in violation of this Court's holding in Adkins v. Division of State Lands, 719 P.2d 524 (1986), which determined that the Board's statutory power was limited to policy making and (with limited exceptions) did not include application of policy to specific facts or rendering individual case decisions.

6. Whether the Director of the Division unlawfully declined to respond to certain requests for declaratory rulings filed by NPCA pursuant to Utah Code Ann. §63-46a-15 that were relevant to the lawfulness of the decision to approve the Capitol Reef land exchange.

7. Whether the action of the Board and the Division approving the Capitol Reef land exchange and the patent conveying the Capitol Reef section to the County should be invalidated and remanded for proceedings in accordance with law if the above issues, or any of them, are determined in favor of NPCA.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS

(1) §6 of Enabling Act

(2) Art. XX, Utah Constitution

(3) Utah statute on multiple use, §65-1-14

(4) National Park Service Organic Act, nonimpairment provision, 16 USC §§ 1 and 1a-1

(5) Division of State Lands and Forestry, Surface Policies, continaing minutes of Board of State Lands meeting June 14, 1984 approving §1.600 "Management of Sensitive Areas" and minutes of Board of State Lands meeting July 19, 1978 approving §1.400 "Environmental Assessments".

(6) In re Declaratory rulings: UCA § 63-46a-15 and Board of State Lands procedural rules R632-7-1 through R632-7-5, together with definitions appearing in §63-46a-2.

STATEMENT OF THE CASE

1. Nature of the Case, Course of Proceedings and Disposition Below

This case arises on a Petition for Review filed by the National Parks and Conservation Association ("NPCA") challenging the administrative proceedings and decisions of the Board of State Lands (the"Board") and of the Director of the Division of State Lands and Forestry (the "Director" and "Division") in approving a land exchange sought in an application filed by intervenor Garfield County, Utah (the "County").

By application dated April 23, 1987, the County sought approval of a land exchange by which it proposed to acquire a state "school section" within Capitol Reef National Park by proffering in exchange certain other land owned by the country. (The "Capitol Reef land exchange.") [R. 5-7] On September 11, 1987, at a scheduled meeting, but without any published or other general public notice of the proposed land exchange the Board approved the proposed exchange "in concept," subject to certain further proceedings and conditions. [R. 54] At that meeting an NPCA representative, in written and oral statements, presented certain substantive and procedural objection to the exchange. NPCA requested deferral of any decision pending adequate notice to interested citizens, opportunity to obtain information concerning the proposed exchange, and opportunity to participate before the Board, with appropriate formal administrative proceedings. [R. 41, R. 52-53]

On October 14, 1987, NPCA filed a letter "petition to intervene" in the continuing proceedings [R. 61-64], and a letter requesting that the Board or Division render certain declaratory rulings pursuant to Utah Code Ann. § 63-46a-15 concerning issues raised by the pending land exchange application. [R. 65-71] NPCA further requested that action on the exchange be deferred for 30 days following issuance of the requested declaratory rulings, to permit it "to file a response, identify any factual issues for appropriate evidentiary proceedings, and offer applicable legal argument." [R. 64]

On November 16, 1987, the Director of the Division denied NPCA's petition to intervene [R. 74-75]. On December 21, the Director responded to NPCA's requests for declaratory rulings, denying or refusing to respond to, all but one of NCPA's nine requests. [R. 83-87] Also on December 21, 1987, pursuant to the Board's decision on September 11, 1981, the Director took formal action approving the Capitol Reef land exchange [R. 89], sub silentio denying NPCA's request that final action be deferred pending opportunity respond after review of the requested declaratory rulings. On December 24, 1987, pursuant to the Director's formal approval, the Governor executed a patent conveying the Capitol Reef school section to the County.

2. Statement of the Facts

A. The Capitol Reef Section: Background and Context

The land that is the subject of this disputed land exchange is section 16, T34S, R8#, SLB&M. [R. 5; R. 7] acquired by the State of Utah pursuant to the "school section" grants effected by § 6 of the Utah Enabling Act, 28 Stat. 107, 109 (Act of July 16, 1984). Because Section 16 is located within the exterior boundaries established by the legislation which created Capitol Reef National Park, 16 U.S.C.A. § 273 (1974), 85 Stat. 739 (Public Law 92-207, Dec. 18, 1971), it is hereafter referred to as the "Capitol Reef section."

The Capitol Reef section occupies a scenically spectacular and strategically critical location with Capitol Reef National Park, embracing virtually all of the "Waterpocket Fold" at the point where it is traversed, in a series of "switchbacks" by the much-disputed dirt road known as the "Burr Trail."

Areas on both the north and south side of the Burr Trail where it traverses the Capitol Reef section have been recommended by the National Park Service for wilderness designation. The areas recommended for wilderness designation are the Wagon Box Mesa unit (Unit #2) to the south and the Red Canyon unit (Unit #3) to the north [See map titled "Exhibit A,

Wilderness Plan, Capitol Reef National Park," copies from United States Department of the Interior, National Park Service, "Wilderness Recommendation, Capitol Reef National Park/Utah" (November 1974). This map appears as pages 36-37 of Appendix 7 to Petitioner's Motion to Supplement The Administrative Record.]

The recommended Wagon Box Wilderness unit, at its north end near the Burr Trail (and Section 16) was described by the National Park Service as follows:

> Near the north is the mount of Muley Twist Canyon, which has been cut deeply into the rocks for 20 tortuous, twisting miles. Twelve miles are in this unit. This is excellent hiking country. A rainbow of rock colors can be seen within its walls-white, red, purple, green, gray, brown, and finally yellow where it has cut through solid Navajo Sandstone on the way to its mouth in Grand Gulch.

Id. at 31. Access to premier hiking and scenery of Muley Twist Canyon is available to Park visitors where that canyon cuts through the section and across the Bur Trail, both to the north and south. Recognizing both the beauty and vulnerability of the area, the Park Service commented:

> This unit is the most outstanding of all four wilderness designations, and also the one most fragile and susceptible to damage by outside influences because of its narrowness.

Id. at 31. The Park Service also recognized that the Red Canyon unit (Unit #3) like unit 2, is ideally suited for wilderness backcountry use . . . ." Id. at 32.

The Capitol Reef section is also strategically important in the continuing public dispute concerning Garfield County's efforts to pave the "Burr Trail," opposed by NPCA and other conservation organizations. Paving of the switchbacks that descend the Waterpocket Fold, entirely within the Capitol Reef section, has been one of the major focal points of that dispute. All of the County Commissioners of Garfield County have expressed their intention to press for paving of the entire road, including the portion within the Park, although the controversy currently has concentrated on the portion of the Burr Trail extending west of the Park boundary to Boulder, Utah.

The immediate relevance of the paving dispute to this case arises because there are undisputed indications, expressly acknowledged by the Board, that a major factor in this land exchange was Garfield County's effort to use the Capitol Reef section as "leverage" to force Congress to release funds for paving that were included in a 1985 appropriation bill, but withheld "subject to authorization." Thus, although $8.1 million was appropriated, the specific condition required proponents to obtain a further authorization bill before funds would be available for road construction. See H.J. Res. 465, 131 Cong. Rec. at H12038 (daily ed. Dec. 16, 1985) (continuing appropriation resolution for fiscal 1986). [Attached as

Appendix 3 to Petitioner's Motion to Supplement Administrative Record.]

The administrative record contains substantial indications of the Board's affirmative participation in the use of this land exchange to assist Garfield County's efforts in using the Capitol Reef section as a "lever" to force release of the paving monies.

Most explicitly, in the course of the Board's consideration of the exchange proposal, a representative of the Wilderness Society observed that --

> in an article in the Salt Lake Tribune of September 3, it was noted that the land could be used as leverage for authorizing the freeing-up of the money for paving the Burr Trail.1

In response, without contest or question by other Board members or by the Garfield County Commissioner (who was present),

> Mr. Bates, of the Board, asked if the Wilderness Society was willing to go to the people in Congress who are blocking the appropriated monies and get them released. Garfield County has been very up-front with their proposal of why they want these lands. They only want to get the road paved. [R 53-54]

In addition to the above, there were other explicit indications in the record that the Board's response to the

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1 The article referred to, by Salt Lake Tribune reporter Jim Woolf, titled "Garfield Hopes to Land Burr Trail Funds by Trading Acres," published Sept. 3, 1987, is included as Appendix 8 to Petitioner's Motion To Supplement The Administrative Record, in order to provide the context for the above comment and the ensuing Board member's response.

proposed exchange was strongly influenced by the County's political objectives. A memorandum to the Board by the Division staff expressly acknowledged that "in several respects existing policy does not apply to this proposal." [R. 36] The memorandum, as well as Board discussion, repeatedly acknowledged conflict with a prior policy, established through a "Memorandum of Understanding" ("MOU") executed by Governor Ganberter and by Secretary of the Interior Hodel, designed to provide "for the removal of State sections from national parks . . . through Federal Land Policy and Management Act exchange procedures." [R. 31; R. 34-35; R. 43; R. 46-47; R. 49-53] Despite that basic and admitted conflict, the Division Staff and the Director repeatedly attempted to justify the policy conflict with the MOU on the basis of "assumptions" and undocumented representations that the County would eventually convey the Capitol Reef section to the Park Service. [R. 34; R. 47; R. 49-51; R. 54]

Finally, the specific involvement of the agencies in the County's political maneuvers is revealed by one of the two grounds on which the management option of "private sale" was rejected. That alternative was expressly rejected not only because it would "only provide appraised value," but also because it "may prevent effective control by the County . . . ." [R. 36; R. 49]

B. The Initial Agency Proceedings

By application dated 23 April, 1987, Garfield County applied to the Division of State Lands and Forestry for approval of a proposed land exchange by which the County would acquire Section 16, T34S, R8E, SLB&M (the "Capitol Reef section") owned by the State of Utah pursuant to the "school section" grants effected by § 6 of the Utah Enabling Act, 28 Stat. 107, 109. [R. 5; R. 7] In exchange for acquisition of that section, the County proposed to convey certain County-owned properties. No public notice of the proposed exchange, or notice of availability of documents analyzing or implementing the exchange, was provided to the public, including NPCA.[2]

On September 11, 1987, the proposed Garfield County land exchange was considered at a scheduled meeting of the Board of State Lands. At that meeting, a representative of NPCA offered oral and written statements opposing the exchange

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2 NPCA learned of the pending exchange application shortly before the Board's meeting on September 11, 1987, through review of the agenda of the Utah Resource Development Coordinating Committee. The key Division memo dated July 27, 1987, summarizing and analyzing the exchange [R. 42-54] was made available to NPCA, only after repeated requests, in Moab, Utah, the evening before the Board meeting. See Affidavit of Terri Martin, Appendix A to Petitioner's Motion to Supplement the Record.

on substantive and procedural grounds. Emphasizing that there "has been failure to give adequate notice to the public for its opportunity to provide comments," [R. 53] NPCA requested that consideration of the matter "be deferred pending appropriate notice and opportunity for citizens, including ourselves, to obtain further information regarding the proposed exchange." [R. 41]

Material substantive and procedural issues concerning the proposed exchange were identified at or prior to the September 11, 1987, meeting by members of the Board, by the Division staff, by NPCA, by officials of the U.S. National Park Service and others. [R. 39-41; R. 44; R. 46; R. 54] Without addressing or explaining its resolution of any of those issues, either on September 11 or in any subsequent meeting or document,[3] the Board acted to approve the exchange "in concept." [R. 54] That decision, however, provided for further proceedings on the exchange because the Division staff had raised doubt about the propriety of accepting the lands proffered in exchange by the County unless those lands

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3 Specific material issues identified in the agency proceedings but not explained or resolved by the Board or Division are summarized, infra pp. 20-23 under the heading "Final approval of the land exchange and failure to state the grounds for decision and identified issues"

represented greater than "equal value" [R. 49], and the County had indicated willingness to identify additional property for exchange. [R. 47] Thus, the Board's approval was made "subject to further evaluation of the County's offer to ensure . . . better that [sic] equal value." [R. 54]

C. Denial of NPCA's Petition to Intervene

On October 14, 1987, NPCA filed a letter styled as a "petition to intervene" in the still-pending land exchange proceeding. [R. 61-64] The petition alleged NPCA's grounds for standing and interest in the proceedings, and identified certain issues that NPCA sought to pursue as intervenor, relating to potential impacts on and protection of Capitol Reef National Park. NPCA's petition noted that "the information and evidence before the Division and Board is limited to internal memoranda and additional information submitted to the Board by Garfield County." [R. 63]

NPCA emphasized that it sought to present evidence and argument to redress the agencies' failure to consider protection of the unique values of Capitol Reef National Park, the interest of Utah citizens in preserving those values, and the grounds on which protection of the non-economic values of the Capitol Reef section would be consistent with maintaining the integrity of the state's trust responsibility for those lands. [R. 63] NPCA also sought opportunity to respond and to

identify disputed factual issues after opportunity to review the Director's reply to its simultaneous "requests for declaratory rulings" on certain key issues, requesting 30 days for that purpose. [R. 64]

NPCA's petition to intervene was denied by the Director in letters dated November 16, 1987, [R.17; R.18] stating the following basis for denial:

> Currently, the Division . . . has no procedures under which a request for intervention in the consideration of an exchange proposal might be granted. In fact, consideration of an exchange application by the Division is not viewed as an adjudicative action under present law. Rather, it is in the nature of a proposal for negotiation. . . . At present, we see no basis for interjection of a third party into such a negotiation process. [R. 74; R. 75]

In denying petitioner's petition to intervene, the Director did not question or contest petitioner's allegations concerning its "standing" and interest in the proceedings. Advising that "the negotiations are nearly complete," he invited NPCA to submit "any information related to the value of the affected properties or any alternative which you may have to offer." [R. 74; R. 75] He also failed to respond to petitioner's requests that decision on the exchange be deferred pending opportunity for notice to the public, for investigation, and for response in light of the interpretations

and policies reflected in the anticipated reply to NPCA's requests for declaratory rulings.

D. Disposition of NPCA's Requests For Declaratory Rulings

Concurrently with its petition to intervene, on October 14, 1987, NPCA also filed certain "requests for Declaratory Rulings" with the Board and Division [R. 65-71] pursuant to Utah Code Ann. § 63-46a-15 and Board of State Lands procedural rules R632-7-1 through R632-7-5. The requests for declaratory rulings explained the reasons why the rulings were needed and sought the agencies' interpretations of statutory and/or constitutional requirements and policies on certain procedural and substantive issues material to the proposed land exchange. Emphasizing the importance of the requested rulings to meaningful participation in the exchange proceedings, NPCA's concurrent petition to intervene emphasized that it "cannot effectively participate in the pending proceedings or protect its rights and interests until determination of the requested declaratory rulings." [R. 64] For that reason, NPCA requested opportunity to defer further response to the exchange proposal until it could review the reply to those requests. [R. 64]

The Director replied to NPCA's requests for declaratory rulings by letter on December 21, 1876 [R. 83-87], declining to rule on all but one of the requests. The

technical legal grounds for that declination are analyzed and challenged at pages 52-55 of this brief.

E. Declaratory Ruling on Consistency of "trust" Management of Responsibilities With Protections of Unique Values on the Capitol Reef Section

Prompted by repeated Board and Division staff invocation of a generalized "trust management" obligation to maximize revenues from school trust lands [R. 33-34; R. 45-47; see also R. 28; R. 58], NPCA's requests for declaratory rulings had sought to determine the agencies' interpretation of the legal content of that concept, as applied to the Capitol Reef section.

Specifically referring to the Capitol Reef land exchange, NPCA's request for declaratory rulings sought to determine --

> whether the applicable statutes, rules, board policies or other authorities permit or require consideration and protection of the unique, long-term scenic, aesthetic and recreational values of state lands in making decisions affecting the disposal of those lands. . . . [R. 28]

In particular, declaratory ruling request #7 inquired concerning the extent to which management to preserve the unique scenic, aesthetic and recreational values and resources of the Capitol Reef section may be consistent with the agencies' concept of the legal content and effect of any

"trust" obligation to generate economic return from the management or disposition of that land. [R. 71, paragraph or request #7]

The Director's reply did provide a declaratory ruling setting forth his interpretation of certain "trust management" concepts [R. 84-87]. That declaratory ruling is analyzed, and challenged in part, in section V.6 of this Brief.

However, the role or effect of those concepts, as interpreted by the Director, on the decision to approve the capitol Reef land exchange cannot be determined because no meaningful statement of the grounds for decision has ever been made available by the Board and Division. Nor have any factual determinations ever been provided that resolve, or even address, the considerations recited by the declaratory ruling as governing the agencies' "trust" obligations in the context of the Capitol Reef land exchange.

F. Final approval of the land exchange and failure to state the grounds for decision on identified issues

The Director took formal action approving the proposed exchange on December 21, 1987, expressly acting on the premise that "the Board approved the concept of exchanging State land" in accordance with the County's proposal. [R. 89] The only decision document was a one-page report of the Director's final approval, which included a summary of appraised values

purporting to show that the County had proffered other or additional land sufficient to equal 150% of appraised value of the Capitol Reef section. [R. 89] The basis for the latter determination is not otherwise reflected in the administrative record; nor was it ever noticed or made available to NPCA or to the public.

Thus, no statement of facts and reasons, statement of grounds for decision, or other explanation has ever been prepared or provided in support of the Board's or Director's decision to approve the Capitol Reef land exchange. Because of the failure to provide any meaningful decision document, many material substantive and procedural issues that were identified in the course of the exchange proceedings were left unresolved, and no explanation for their resolution has been made public.

The need for a meaningful decision document had been asserted in a latter dated December 18, 1987, in which NPCA had "specifically request[ed] that prior to any approval, you address and state the basis for your resolution of the issues raised below." Emphasizing that "the exchange raises important issues that have not been considered or resolved," the letter had listed and explained a number of these issues and their relevance to the Capitol Reef land exchange. [R. 76-77] Although most of the issues presented by NPCA had been raised in the declaratory ruling requests and other submissions and

questions already before the Board and Division, the Director simply declined to respond, on the ground that NPCA's letter "was not received until December 24, 1987, . . . three days after the approval of the exchange." (The same date that the Governor executed a patent deed conveying the Capitol Reef section to Garfield County.)

Furthermore, many of the material issues had been identified in the course of the proceedings by members of the Board, Division staff, officials of the U.S. National Park Service, and others, as well as by NPCA's representative, and are reflected in the administrative record.

The material issues left unresolved by the Director's one-page final decision document, discussed in more detail in sections of this brief which follow, include:

(1) Probable impacts on the scenic, aesthetic and recreational values and resources of the Capitol Reef section and of related areas of Capitol Reef National Park, either from the County's development or use of the section [R. 39; R. 48; R. 50-53], or from successful use of the section as "leverage" to force release of funds that Congress had authorized but not yet appropriated for paving of the Burr Trail.

(2) Inconsistency of the proposed exchange with a comprehensive "Memorandum of Understanding Between The

Department of the Interior and The State of Utah" expressly designed to implement land exchanges by which the State would dispose of unmanageable state school sections within federal reservations, and in exchange acquire consolidated and more manageable holdings from the Department. (Attached as Appendix 4 to Motion To Supplement The Administrative Record.) [Issue discussed in Administrative Record at, e.g., R. 31-32; R. 40-41; R. 43; R. 47; R. 50; R. 52; R. 77-78]

(3) Substantial indications that purposes other than benefit to the school trust played a significant role in the Board's approval of the exchange.

(4) The basis for a related, unsupported "assumption" that the County eventually intended to turn the Capitol Reef section over to the U.S. National Park Service. [R. 34; R. 47; R. 49; R. 51]

(5) The impropriety of the Board's role in the specific land exchange decision under this Court's ruling in Adkins v. Division of State Lands, 719 P.2d 524 (Utah, 1986). [R. 53]

(6) The impropriety of relying on appraisals solicited and submitted by the County rather than obtained or conducted independently by the Board and Division. [R. 9; R. 31; R. 68-69; R. 80]

G. Issuance of patent conveying title to the Capitol Reef section to Garfield County

NPCA is informed that a patent to the Capitol Reef section was executed by the Governor on December 24, 1987, implementing the land exchange as finally approved on December 21, 1987. Neither a copy of the patent nor any statement, recommendation or other transmittals to or by the Governor are included in the certified Administrative Record, but have been requested in NPCA's accompanying Motion to Supplement The Administrative Record.

SUMMARY OF ARGUMENT

ARGUMENT

1. Jurisdiction

NPCA is confident that this Court has jurisdiction over this action, based on the arguments previously submitted in response to the State's Motion to Dismiss. Those arguments are merely supplemented hereby the submission of an affidavit dated April 7, 1988, executed by Professor Ronald N. Boyce, attached as Appendix 2 to Petitioner's Motion to Supplement Administrative Record.

2. NPCA Was Unlawfully Denied Opportunity for Effective Participation in the Capitol Reef Land Exchange Proceedings

A. NPCA's Petition to Intervene was Unlawfully Denied

The Director of the Division of State Lands and Forestry unlawfully denied petitioner's request to intervene in

pending agency proceedings on the proposed Capitol Reef Land Exchange.

(a) No question was raised about the timeliness of petitioner's request to intervene, about the substantiality, legal relevance or lack of representation of the interests petitioner sought to protect, or about petitioner's standing to assert those interests; and where

(b) The only grounds stated for denial of intervention were that the Division "has no procedures" for intervention in exchange proceedings and that there is "no basis for interjection of a third party" into land exchange proceedings because they involve a "negotiation process" rather than an "adjudicative action." R. 74; R. 75.

The Director's characterization is directly contrary to Utah law on this point. §63-46b-1(a) defines reviewable adjudicative proceedings as:

> "all state agency actions that determine the legal rights, duties, priviledges, immunities or other legal interests of one or more identifiable persons. . . ."

This definition is consistent with the case law definition which preceded the Administrative Procedures Act Adkins v. Division of State Lands, 719 P.2d 524, 527 (Utah 1986).

The Director's determination that the Division was free to proceed as if it were a private party negotiating a

home sale is inconsistent not only with the Division's responsibility as a governmental agency, with its own declared position regarding petitioner's requests. Contrary to his declaration that petitioner had no right to intervene, the Director concluded that petitioner had shown sufficient interest in the transaction that he was required to respond to ruling #7 requested by petitioner [R. 84-87].

B. NPCA's Request to Defer Decision Pending Opportunity for Notice, Investigation and Review of Declaratory Rulings was Improperly Denied

The refusal of the Board and Division to acknowledge that they have obligations beyond negotiating a private property transaction is particularly offensive in this case given the fact that the state land in question is within a national park. The important policy questions resulting from that fact were brought to the attention of the Board and Division before, during, and after the September 11 meeting at which the land exchange was approved "in concept." Indeed, some of the most significant issues raised by this fact were identified in the course of the Board's own internal analysis of the proposed exchange. That document dated July 27, 1987 and described in respondent's certification of the record as "Division Advisory Briefing Memorandum for Board of State Lands and Forestry" expressly recognizes that the proposed exchange

raises issues regarding compliance with the Board's trust obligations [R. 33]; regarding conflict with the memorandum of understanding between the state and the Department of Interior [R. 34]; and regarding conflict with the National Park Service regarding impact of the proposed exchange on the National Park [R. 35]. Before the exchange was actually made, additional issues were brought to respondent's attention, including questions regarding the application of the Board's own policy statement regarding management of sensitive lands [R. 71]. Petitioner requested that these issues be reviewed, with opportunity for a full presentation of views, before the exchange was carried out [R. 62-64].

Despite the acknowledged presence of these important issues, the Board and Division refused to defer the decision as requested and proceeded to conduct the exchange as if they were private parties. Agency decisions made in the absence of announced, ascertainable standards are invalid under Utah law. Athay v. State Dept. of Business Regulations, 626 P.2d 965, 966-67 (Utah, 1981). This is particularly true here where the Board has simply refused to face up to its responsibility to weigh, evaluate, and issue the kind of policy decisions which are its responsibility under Adkins v. Div. of State Lands, 719 P.2d 524 (Utah, 1986).

3. The Director's Declaratory Ruling Erred in Holding that Management Decisions Affecting the Capitol Reef Section Must Prefer Options Providing the "Greater Economic Advantage" Regardless of Federal or State Statutory Policies that Permit or Require Protection of Unique Scenic, Aesthetic and Recreational Values

A. NPCA's declaratory ruling request on trust management obligations

In initial stages of the land exchange proceeding, the posture of the Board and Division carried strong implications that legal "trust management" obligations compelled it to base decision solely on a determination of whether exchange with Garfield County would maximize economic return from the Capitol Reef Section [R. 32-36; R. 44-49; R. 54; R. 58] Because that position implied that no consideration could or would be given to the potential impacts of the exchange on the scenic, aesthetic and recreational values of that section or of Capitol Reef National Park, NPCA sought to clarify the Board and Director's interpretation of those "trust" obligations through its declaratory ruling requests. Request #7 sought a ruling determining whether, under applicable law --

> decisions concerning the management, retention and disposal of the state section . . . may properly give preference to protection of significant scenic, aesthetic, and recreational values where such decisions may foreclose or reduce prospects for greater monetary returns. . . . [R. 71]

The ruling request further sought to be advised of the extent to which and the circumstances in which the Board or Division --

> will protect or preserve significant scenic, *aesthetic and recreational values . . . (a) where* . . . decisions that may maximize monetary return are likely to diminish, impair or destroy those values; or (b) where . . . decisions involving greater immediate or short-term monetary return may foreclose or reduce prospects for longer-term monetary benefits [from protecting those values]. [R. 71]

B. The Director's declaratory ruling on trust management obligations

In response to NPCA's declaratory ruling request #7, the Director determined that NPCA had demonstrated a sufficient stake in resolution of the Capitol Reef land exchange to justify a response. Recognizing NPCA's interest in the preservation or destruction of scenic, aesthetic and recreational values, he concluded that "the relationship between the feared impacts and NPCA's proferred [sic] interests is sufficiently articulated to enable a limited ruling." [R. 85]

The Director purported to limit his ruling to Utah Code Ann. § 65-1-14 and other authorities only to the extent necessary to determine the applicability of that section [R. 85], because NPCA's request had specifically identified only that statute, together with "other applicable statutes, constitutional provisions, rules or policies" that may govern

protection of scenic, aesthetic and recreational values. [R. 71] The request was cast in those terms, however, because the Division and board documents referring to the "trust obligation" or duty to maximize economic return had not identified specific statutory or constitutional sources in asserting that obligation.

In any event, although the Director purported to limit the scope of his ruling, it specifically and without qualification asserted his interpretation of the provisions of the Utah Enabling Act and Utah Constitution as they define the source and reach of a "trust obligation" to maximize economic return.

Although the Director's reply to NPCA's ruling against #7 is not free from ambiguity, it may be summarized as follows:

(1) Lands acquired by the State under the "school section" grants in § 6 of the Utah Enabling Act, 28 Stat. 107, 109, were granted for the support of the public schools and, pursuant to Article XX of the Utah Constitution, are held in trust for that purpose. As a trust asset, those lands must be managed consistently with the trust purpose. Although no specific standards are prescribed by law, management of those trust lands must be consistent with the trust purpose, which may not be subordinated to other objectives.

(2) "School sections," including the Capitol Reef section, may be managed in accordance with other applicable law so long as management is consistent with the Enabling Act purpose. Thus, "multiple use and sustained yield" concepts prescribed by U.C.A. § 65-1-14 are applicable to school trust lands including the Capitol Reef section, and provide for management designed to preserve and protect significant scenic, aesthetic and recreational values so long as such management is consistent with the Enabling Act purpose of providing support for the public schools by realizing economic advantage from trust lands.

(3) because the trust obligation runs to an "open class" which includes future as well as present beneficiaries, the trustee's duty includes conservation of trust asset value to assure that present class members are not unduly benefited at the expense of future class members. Protection of non-economic values on trust lands, therefore, will be consistent with trust requirements to the extent that protective management properly serves to conserve trust asset value for future class members.

(4) Management for protection of scenic, aesthetic and recreational values is permissible, and may even be required, where those values support or are essential to

generating economic benefits from state school trust lands, including the Capitol Reef section.

(5) However, when there is a choice between two actions, both of which provide some measure of economic benefit to the school trust, management decisions may not prefer the more protective option unless the Board or Director determines, in their discretion, that it will generate the "greater economic advantage."

C. Only an Explicit, Factually-Demonstrable Conflict With Trust Obligations Can Justify Overriding Protective Statutory Policies

NPCA submits that the latter aspect of the Director's interpretation of the trust obligation cannot be the law.

In an appropriate case, NPCA would contest those aspects of the Director's ruling suggesting that other statutory policies may never take priority over concepts of trust management under the Enabling Act. For purposes of this case, however, it is necessary for NPCA to challenge only the last element of his interpretation.

It is apparently the Director's position that even if substantial economic benefits would arise from management policies designed to protect unique scenic, aesthetic and recreational values, and even if those protective policies are authorized or mandated by federal or state statutes of general application, the Board or Director may not select the more

protective management option unless it will also generate "the greater economic advantage." Thus, under the Director's ruling, even statutory protective policies that would generate substantial economic gains may not be preferred or applied unless they happen to coincide with the Board's or Director's discretionary views of the "greater economic advantage."

Under this approach, then, even mandatory federal policies against "impairment" or "derogation" of the purposes and resources of national parks, proscribed by 16 U.S.C. § 1 and 1a-1, must apparently be disregarded if the Board or Director, in their discretion, decide that greater economic advantage lies in disregarding those policies. Similarly, under the Director's view of the "trust obligation," the "multiple use/sustained yield" policies of Utah Code Ann. § 65-1-14, which ordinarily would call for special protection of significant non-economic values, may play no role in the choice of management strategies.

This approach claims too much discretion for the Board or Director acting as "trustee". Statutory requirements that ordinarily control and limit the scope of agency authority may be rendered ineffectual by the agencies' unexplained determination that compliance with statutory standards may not yield the "greater economic advantage."

NPCA submits that the Director's interpretation of the trust obligation cannot be the law. The duty of faithful management of state school lands cannot, through generalized claims of uncontrolled administrative discretion, be converted to a device for self-administered exemption from valid legislative policies.

Statutory standards that provide for or require protection of unique or significant values on state lands must be interpreted as creating a legislative presumption that the long-term value of the land exceeds any other economic return that may be extracted from it. For that reason, NPCA questions whether trust duties in the management of state school sections may ever be permitted to override lawful statutory standards otherwise applicable to those lands.

At a minimum, however, if the presumption in favor of statutory policies is ever to be overridden, the agencies acting as trustee must be required to identify an explicit, factually- demonstrable conflict between statutory provision for resource protection and the obligations of trust management. In the absence of such a clear conflict, there can be no legitimate basis for disregarding statutory protections.

(1) Valid statutory policies and other trust obligations provide for protection of the significant scenic, aesthetic and recreational values of the Capitol Reef Section

(a) Under national park protection legislation

The significant scenic, aesthetic or recreational values of the capitol Reef section were recognized and embraced by statutory protection in 1971, when Congress included the section "within the boundary generally depicted on the map" establishing the boundaries of Capitol Reef National Park. 16 U.S.C.A. § 273 (1974), 85 Stat. 739 (Public Law 92-207, Dec. 18, 1971). Inclusion within a national park obviously constituted recognition that it is among "the most outstanding natural and scenic outdoor areas" in the country. House Conference Report No. 92-685, 92 Cong. 1st Sess., 1971 U.S. Code Cong. & Admin. News 2278, at 2280. That recognition was emphasized by the park Service's subsequent wilderness recommendations for the area. See supra, page 10-11.

Under the same statute's recognition of "valid existing rights," of course, the state retained its Enabling Act rights in the Capitol Reef section. But its inclusion within a unit of the National Park System embraced it, with adjacent lands, within the statutory protections of the National Park Service Organic Act, which provides for regulation of the use of national parks in conformity with their "fundamental purpose:"

> to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such

> manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C.A. § 1 (1974) (Act of Aug. 25, 1916, 39 Stat. 535.) That protection, made applicable to all units of the National Park System, 16 U.S.C.A. § 1c (1974), was further expanded by 1978 amendments which made the regulatory purpose explicit and of broad application.

The 1978 amendments to Organic Act provided that "the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System," and that activities in park units shall not be authorized "in derogation of the values and purposes for which these various areas have been established." 16 U.S.C.A. § 1a-1 (West Supp. 1987). Furthermore, the broad reach of that amendment was emphasized by its legislative history. Without contest from dissenting senators, the key committee report explicitly indicated that the amendment was designed to resolve legal disputes about "competing private and public values" not only in the parks but in surrounding areas:

> This restatement of these highest principles of management is also intended to serve as the basis for any judicial resolution of competing private and public values and interests in the areas surrounding Redwood National Park and other areas of the National Park System.

S.Rep. No. 95-528, 95th Cong., 1st Sess., 7-8 (1977).

Finally, these provisions have been recognized as having protective effect beyond the formal boundaries of the Parks, at least within in-holdings inside the parks' exterior boundaries. Free Enterprise Canoe Renters Assoc. v. Watt, 711 F.2d 852 (8th Cir. 1983) (sustaining regulations that barred uncertificated, out-of-park canoe rental agencies from utilizing county or state roads to launch canoes within the exterior boundaries of Ozark National Scenic Riverways); United States v. Brown, 552 F.2d 817 (8th Cir. 1977) (sustaining regulations that barred hunting on waters within Voyageurs National Park in which Minnesota claimed ownership or concurrent jurisdiction and on which state law expressly continued to permit hunting).

(b) Under Utah's multiple-use/sustained yield policy

There can be no doubt that the Utah Legislature intended that multiple-use/sustained yield principles would govern management of school trust lands, for it specifically provided in § 65-1-14 that those principles would govern, so far as "consistent with school trust responsibilities." On the face of the statute, it is plain that multiple use principles to be adhered to unless they are shown to be inconsistent with "school trust obligations".

There can also be little doubt that principles of "multiple use/sustained yield," as defined in Utah Code Ann. § 65-1-1-4, provide for protection of unique and significant lands of park quality as part of the "combination" of uses "that will best meet the present and future needs of the people of Utah." Since there is no hint that park uses are not among those to be so managed, the Board or Division would have to offer a substantial justification for different treatment of lands already recognized by Congress as qualifying for national park protection.

That obvious conclusion is directly supported by the Director's Declaratory Ruling on NPCA's request #7. He explicitly acknowledges that the requirement of multiple use --

> suggests that the management and use of scenic, aesthetic, and recreational resources on State land might be granted status equal to economic considerations <u>in regard to the particular Section 16</u>, based on the statutory definition of multiple-use/sustained yield. [R. 86; R. 87] (Emphasis added.)

While the Director then interposes his views of the trust obligation, he does not otherwise question the protection of the Capitol Reef section under the multiple-use principles of Utah Code Ann. § 65-1-14.

(c) <u>A common law "trust obligation" to protect unique natural values for the benefit of the public imposes a burden of specific justification for disposal decisions</u>

In his influential 1970 article "The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention," 68 Mich. L. Rev. 471 (hereafter, Sax), Professor Joseph L. Sax traced the development of judicially-developed concepts of a "public trust doctrine" which he found emerging in response to the environmental problems created by "inconsistency in legislative response and administrative action." Sax at 474.

While Professor Sax did not purport to find a rigorous and specific legal doctrine protecting public lands and resources, he did explore a wide range of examples of judicial skepticism toward government disposition of public interest lands for the benefit of limited classes of beneficiaries. Drawing from the celebrated public trust case of Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892), which had applied the doctrine to invalidate a deed to the Lake Michigan water front originally granted by the Illinois legislature, Sax found in that case "the central substantive thought in public trust litigation:"

> When a state holds a resource which is available for the free use of the general public, a court would look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.

Sax at 490.

Pursuing that "model of judicial skepticism," Sax found that developed case law had taken positions requiring clear and explicit justification for disposition of public interest lands -- very like NPCA's contention here that protective statutory standards must be respected in the absence of a demonstrable conflicts between resource protection and the specialized "school trust" obligation. Thus, for example, he found that the Massachusetts court had developed a rule "that a change in the use of public lands is impermissible without a clear showing of legislative approval," Sax at 492, citing, e.g., Gould v. Gaylock Reservation Commission, 350 Mass. 410, 215 N.E.2d 114 (1966). Based on that initial requirement, he found that the Massachusetts Court in Gould and subsequent cases --

> has penetrated one of the very difficult problems of American government -- inequality of access to, and influence over, administrative agencies.

Sax at 498. He found that the Court had followed up in subsequent cases that imposed a rigorous standard requiring explicit legislative authorization for any administrative actions invading the public interest in public preserves. Id. at 498 - 502, detailing the holdings in Robbins v. Department of Public Works, ___ Mass. ___, 244 N.E.2d 577 (1969), and Sacco v. Department of Public Works, 352 Mass. 670, 227 N.E.2d

478 (1967). And Sax found an essentially parallel development, involving sophisticated and intensive scrutiny of agency-proposed projects that may invade publicly-used lands or waters, in the Wisconsin and California case law. Sax at 509-524 and 524-546.

While he concludes that the courts will not necessarily hold such dispositions illegal per se, Sax emphasizes that

> they do want to know what public purpose justifies them, and they want to put legislatures and administrators on notice that such dispositions will be closely scrutinized and must be reasonably justifiable in terms of the public benefits to be achieved.

Sax at 564.

The "public trust" law continues to develop in response to the continuing and accumulating conflicts between protection of public preserves and the commodity demands of a consumptive society. Thus, in 1983, the California Supreme Court confronted a classic example of those conflicts which, like this case, involved an important clash between preservation of scenic and ecological values and administrative application of traditional legal doctrines supporting consumptive use of resources.

National Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709,

718-724, 729 (Sup. Ct. Calif., en banc, 1983) pitted the unique scenic beauty and ecological values of Mono Lake against the traditional exercise of water appropriation doctrines, administered through the agency of the California Water Resources Board. Recognizing both the important protective policies underlying the public trust doctrine and the need for exercise of legislative authority to permit diversion of water for public purposes, the Court took a position very like that urged by NPCA in this case:

> Approval of such diversion without considering public trust values, however, may result in needless destruction of those values. Accordingly, we believe that before state courts and agencies approve water diversions, they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.

33 Cal.3d 4 __, 658 P.2d at 712. Reviewing the substantial body of California case law, the Court emphasized that even the private beneficiaries of state conveyances of trust lands take their interest "subject to the public trust." 658 P.2d at 722-23. While the Court recognized that the California Water Board could validly approve the contested water appropriations, it emphasized that --

> the state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible . . .

and that no official body --

> has ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Aqueduct . . . [or] whether some lesser taking would better balance the diverse interests.

658 P.2d 728. On that basis, the Court held the public trust doctrine permitted both administrative and judicial reconsideration and reallocation of prior water allocations based on consideration of "the impact of water diversion on the Mono Lake environment." 33 Cal.3d at 729, 658 P.2d at 729.

Whether viewed as setting a rigorous standard for protection of public land values, or as a guide to rigorous judicial skepticism, the underlying policies of the public trust are clearly not met in this case. Those policies cannot be satisfied by the Board and Director's vague assertions of "school trust" obligations, particularly where offered without any meaningful or specific statement of the basis for decision. Nor can they be met while failing to consider the statutory standards specifically protecting our national parks, or state multiple use policies designed to facilitate protection of the public's interest in those lands.

Finally, in view of the Board's disregard of its own previously-adopted statement on "Management of Sensitive Areas," and its disregard of the Governor's own Memorandum of

Understanding, designed to facilitate exchanges between the State and Interior Department that would protect national park values, it is obvious that the Board's decision to convey the Capitol Reef section to Garfield County did not fulfill the Board's duty to protect public trust lands "whenever feasible."

(2) The Director's interpretation is not required by the established case law on "trust" obligations for the management of state school sections

Ironically, Article XX, §1 of the Utah Constitution, on which the Director relies for his confining interpretation of "school trust" obligations, may actually be the appropriate basis for recognition of a broader "public trust" duty, at least requiring that Board decisions respect the public interest in unique noneconomic values on state school sections "whenever feasible." While § 6 of the Utah Enabling Act unquestionably requires careful "trust" administration of funds derived from the school lands, Article XX imposes a generalized trust concept that fairly imports a general duty to protect the public interest in lands acquired from Congress:

> All lands of the State that have been, or may hereafter be granted to the State by Congress . . . are hereby accepted, and declared to be public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired. (emphasis added)

Utah Const. art. XX, § 1.

Exploring the prospects for application of school trust concepts compatibly with protection of noneconomic environmental values, Professor McCormack has pointed out that the acceptance of public lands "in trust for the people" "could be read to grant the state flexibility to use school lands in a broad public trust fashion, including nonrevenue uses, so long as the lands are disposed of "as may be provided by law." On that basis, then, his interpretation "would distinguish between the duty owed the school fund following disposition and the duty owed the public while the lands remain in state ownership." W. McCormack, "Land Use Planning and Management of State School Lands," 1982 Utah L. Rev. 525, at 532.

McCormack goes on to show that the confining case law on which the Board and Director may be expected to rely deals almost exclusively with disposal of trust lands, or income from trust lands, for nonschool purposes. Id., citing the Supreme Court's holdings in Ervien v. United States, 251 U.S. 41 (1919) and Lassen v. Arizona Highway Department, 385 U.S. 458 (1967).

A more recent case to the same effect is State v. University of Alaska, 624 P.2d 807 (Alaska 1981). The provocation for the case involve management of school section lands within a state park to deny a development right-of-way.

But that focus was changed by the University- beneficiary's intervention with a declaratory judgment claim challenging the validity of the action of the Alaska legislature in appropriating the land for a state park without land exchange or other compensation. 624 P.2d at 810. The Court's holding, then, like Lassen and Ervien, was clearly based on the the uncompensated disposal of trust lands.

A recent Colorado District Court case, drawing from an 1893 Colorado Supreme Court interpretation of a state constitutional obligation similar to the Utah "trust" concepts, has held that the constitutional obligation for the Colorado State Board of Land Commissioners to maximize financial return does not override the state's Mined Land Reclamation Act. Under a provision of that Act requiring conformity with local zoning regulations, a mine operator was denied permission to expand a mining operation on leased state land because the local county determined that the expanded mining would violate its zoning ordinance. Wesley D. Conda, Inc. v. Colorado Mined Land Reclamation Board, et al. (Case No. 86CV2812, Dist. Ct., City and County of Denver, decided 26 Jan. 1988), relying on In re Leasing of State Lands, 18 Colo. 359, 32 P. 986 (1893). Unlike Art. XX of the Utah Constitution, the Colorado constitutional provision at issue in these cases expressly provides that it is the duty of the land commissioners to

"secure the maximum possible amount" for state lands acquired from the United States. Colo. Const. Art. IX, § 10. But the same provision also provides, like the similar Utah provision, that the Commissioners' duties are to be exercised "under such regulations as may be prescribed by law." Relying on that constitutional recognition that statutory requirements may regulate the exercise of the land management duties, both Colorado decisions recognized that statutory controls could be exercised so long as they did not seek to oust the agency's ultimate control of the power of disposition of the state lands.

On review of the case law, McCormack properly concludes that even where the state retains trust lands,

> there is little in the [Lassen] opinion to indicate that the state cannot define "fair market" by reference to land use planning goals. The whole concept of zoning and land use planning presupposes that land values are affected by planning decisions. . . .

1982 Utah L. Rev. 537.

In the context of the Capitol Reef land exchange, this point is well taken: none of the trust cases invalidate interim management programs which may give weight or preference to the protection of noneconomic values. None questions the propriety of comprehensive, calculated policies such as that reflected in the Utah-Interior Department MOU which, if implemented, would eliminate conflicts between protected

national park lands and income production on school trust lands. Furthermore, none of the cases even raises doubt about the propriety of proper planning for protection of noneconomic values on unique school trust lands where conducted as part of a comprehensive program designed to protect those values as an inducement for tourist or other income producing activities on trust lands outside the protected area.

Finally, McCormack properly points out that, far from a violation of trust responsibilities --

> noneconomic management of school sections could be asserted as a duty owed to the public school system in some instances. Particular sections may have historical values that should be preserved to give future generations of school children the opportunity to observe land and the life it supports in a natural setting. . . . [T]hose arguments . . . are not far removed from the duty of any trustee to conserve trust assets in a prudent fashion. When reinforced by . . . the Utah Constitution, which accepts state lands 'in trust for the people,' those arguments illustrate the potential breadth of management obligations.

1982 Utah L. Rev. 537-38. Obviously, that concept of an affirmative duty to preserve unique lands for their special value for future generations is significantly strengthened where the land in question was specifically included by Congress in national park lands set aside to be conserved

"unimpaired for the enjoyment of future generations." 16 U.S.C.A. § 1 (1974).

(3) Application of statutory standards to limit the scope of agency discretion should not be abandoned because the agency characterizes itself as a "trustee"

Although both state and federal statutory standards, applied with rigor under the oversight of public trust concepts, would provide for agency protection of the unique values of the Capitol Reef section, the Director's ruling lays claim to a maze of "discretionary" judgments that would pre-empt those statutory protections. He recognizes that protection may be appropriate where discretionary judgments find the protective management. Protective management may also be appropriate where discretionary judgments find that long-term "asset value" will be enhanced for future class members. Finally, the Director's ruling would overlay those wide-ranging judgments with yet another crucial discretionary judgment -- as to "greater economic advantage" -- for only with that finding would statutory protections of noneconomic public land values be given effect.

Despite the pre-emptive effect of this wide-ranging claim of discretion, the Director offers virtually no hint of the specific considerations that may weigh in favor or against any of the critical findings. Furthermore, that unconfined,

unstructured, unchecked discretion would apparently be exercised in the same manner as the Board's decision in the instant case: without findings or reasons that address either the statutory requirements or the discretionary considerations that govern particular decisions.

So far as may be discerned from the Board's decision or the Director's decisions in either the land exchange or declaratory ruling matters, the sole justification for this extraordinary claim of supervening discretionary power lies in the contention that the Board (or the Director) must exercise the role of "trustee" under the "trust obligation" imposed on the relevant land manager by the Utah Enabling Act. Furthermore, as is more fully demonstrated in the sections which follow, this approach is adopted in a context in which virtually any rational choice in preferring one approach over the other is hidden and thus invulnerable to meaningful review or testing.

4. Neither the Board Nor the Director Made Factual or Legal Findings or Determinations Necessary to Support Their Decision to Approve the Capitol Reef Land Exchange

As this court pointed out in Milne Truck Lines v. Public Service Commn., 720 P.2d 1373, 1378 (Utah, 1986), administrative agencies cannot discharge their statutory responsibilities without:

> . . . making findings of fact on all necessary ultimate issues under the governing statutory standards. It is also essential that the Commission make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached.

The record in this case shows no explanation whatsoever explaining the Board or Division's reasons for giving this land to the county. As has been shown above, the fact that the land in question lies within a national park raises a set of legal and policy issues. This land is subject to unique statutory, administrative, and policy considerations. That backdrop of legal protection; coupled with the proposition that the Board and Division's trust obligations ought to make them highly skeptical about giving away trust lands to further the short term objectives of politically influential special interest groups; require some statement of the basis for these decisions and actions.

The refusal of either the Board or Division to give any such explanation is particularly offensive in this case because as those entities proceeded, petitioner expressly and

repeatedly brought to their attention those issues which they have simply refused to address.

5. The State Land Board Unlawfully Made or Participated in the Decision to Approve the County's Application for this Land Exchange

As has been demonstrated above, the administrative record is virtually silent regarding what basis the Board or Division actually relied on in deciding to give Garfield County the land it requested. The record does show, however, that the only decision reflected in the record is that of the Board rather than the Division. The reasonable inference to be drawn from this record is simply that the Board mandated the decision to give this land to the county, and the Board allowed it to do so. Once again, the Board and Division have reversed the roles they are empowered to perform under their enabling legislation. Adkins, supra.

6. The Director Unlawfully Declined to Respond to NPCA's Requests for Declaratory Rulings

On October 14, 1987, petitioner requested that the Board or Division render nine declaratory rulings. [R. 65-71]. Three days before causing the land in question to be deeded to the county, the Division's director responded to request No. 7 and declined to respond to all the other

requests. [R. 83-87] In responding to request No. 7, the director conceded that:

> With respect to request No. 7, the NPCA asserts substantial interest without specifying what those interests are. However, with the accompanying Petition for Intervention, the NPCA asserts with some particularity those injuries it fears will be associated with the proposed land exchange. Thus, although the form of the petition is not in strict compliance with Rule R632-7-4, NPCA has provided adequate information relative to NPCA's stake in the resolution to allow a review of applicability to some extent.
>
> R. 84, fifth paragraph.

The director then reviews in his next three paragraphs petitioner's statement of its interests expected to be adversely affected by the proposed exchange concluding:

> ". . . the relationships between the feared impacts and NPCA's proffered interests is [sic] sufficiently articulated to enable a limited ruling." R. 85

In direct, and inexpliable contradiction, the director claims in this same letter that he need not respond to requests 1 thru 6 because petitioner ". . . has provided inadequate information to assure that responses to the requests are necessary to protect or preserve NPCA's rights, status, or legal relationships." [R. 84] These requests appear at record pages 66-70, and petitioner contends that they may be fairly summarized as requesting the Board and Division to subject themselves to the discipline of objectively reviewing the

September 11 Board decision approving the exchange "in concept", given the apparent inconsistency of that decision with the reasoning of Adkins v. Division of State Lands, supra, or with §65-1-14 Utah Code. Petitioner's interest in these issues is indistinguishable from its interest in the issue framed by request No. 7. In each case, petitioner's interest is the protection of national park lands from damage resulting from an ill considered and unlawful transfer apparently intended to serve short term political goals. Petitioner's requests 8 and 9 sought certain further rulings "in connection with the rulings requested in paragraph 7". [R. 71]. This paragraph is identified as request No. 7 in the director's December 21, 1987 response to these requests [R. 84] and is referred to as request No. 7 throughout this brief. While implicitly conceding that petitioner's interest in the issues raised by these requests is indistinguishable from its interest in the subject of request No. 7, the director declined to respond to these requests.

Requests 8 and 9 asked the Division and Board to evaluate and determine what weight ought to be given, in analyzing the requested transfer, to the Board's policy statement regarding "management of sensitive areas" (adopted June 14, 1984, Appendix J to Petition for Review) and

environmental assessments" (adopted July 19, 1978, Appendix K to Petition for Review).

The director responded to these requests, first by denying that "the Division" has any Surface Policy document ". . . providing for either management or sensitive areas or environmental assessments." [R. 84, third paragraph] The director then claimed that even if a Surface Policy document did exist, such a policy could not be the subject of a declaratory ruling because the policies are not statutes, rules, or orders. [R. 84, fourth paragraph]

The Surface Policy documents which appear as appendices J and K to the Petition for Review show that each was a policy recommended by the Division staff to the Board and unanimously approved by the Board. These types of policy determinations are the proper function of the Board as explained in Adkins, supra.

The director's overly technical construction of §63-46a-15 is expressly refuted by the definitions which appear in §63-46a-2. §63-46a-2(10)(b) states: "A policy is a rule if it conforms to the definition of a rule." §63-46a-2(13)(a) defines a rule as an agency's written statement which has the effect of law, implements a legal mandate, and applies to a class of persons. Given the role of the Board and Division as interpreted and explained by the Adkins case, these written, formally adopted policies meet that definition.

7. The Conveyance Pursuant to Invalid Agency Action Should be Rescinded, and Proceedings Should be Remanded With Instructions

§65-1-70, Utah Code, authorizes Utah's Governor to execute and deliver patents pertaining to the state's lands upon request of the Division of State Lands. This authorization is, of course, conditioned on a lawful request from the Division. A conveyance of real property by a state is only valid if done with proper authority. Cf State Land Board v. Heuker, 548 P.2d 1323, 1328 (Ore. 1976); State v. Hatch, 342 P.2d 1103 (Utah, 1959); Thomas v. Daughters of Utah Pioneers, 197 P 2d 497 (Utah, 1948).

As has been demonstrated above, this transfer lacked proper authority and should be rescinded.

DATED this 30th day of June, 1988.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing Brief of Petitioner, postage prepaid, this 30th day of June, 1988, to the following:

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